

**STATE OF TENNESSEE  
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

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<b>IN THE MATTER OF:</b>	)	
	)	
<b>MARK CLARK and</b>	)	
<b>RUSSELL CALDWELL</b>	)	<b>DIVISION OF WATER</b>
	)	<b>POLLUTION CONTROL</b>
	)	
<b>RESPONDENTS</b>	)	<b>CASE NUMBER WPC07-0258</b>
	)	

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**DIRECTOR’S ORDER AND ASSESSMENT**

NOW COMES Paul E. Davis, director of the Tennessee Division of Water Pollution Control, and states:

**PARTIES**

**I.**

Paul E. Davis is the duly appointed director of the Division of Water Pollution Control by the commissioner of the Tennessee Department of Environment and Conservation (hereinafter the “division” and the “department” respectively).

**II.**

Mark Clark (hereinafter “Respondent Clark”) is a resident of the State of Florida and is the owner and developer of Spring Lake Subdivision, a residential development located adjacent to Deer Run Road in Grundy County (hereinafter “the site”). Service of process may be made on Respondent Clark at 1406 S.E. 38<sup>th</sup> Street, Ocala, Florida 34471.

**III.**

Russell Caldwell d/b/a Russell Caldwell Construction (hereinafter “Respondent Caldwell”) is a resident of the State of Tennessee and is contracted by Respondent Clark to

conduct construction activities at the site. Service of process may be made on Respondent Caldwell at HCR 76, Box 204, Gruetli Laager, Tennessee 37339.

## **JURISDICTION**

### **IV.**

Whenever the commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) § 69-3-101 *et seq.*, the Water Quality Control Act (the “Act”), has occurred, or is about to occur, the commissioner may issue a complaint to the violator and the commissioner may order corrective action be taken pursuant to T.C.A. § 69-3-109(a) of the Act. Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. § 69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. § 69-3-116 of the Act. Department Rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. § 69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (the “Rule”). Pursuant to T.C.A. § 69-3-107(13), the commissioner may delegate to the director any of the powers, duties, and responsibilities of the commissioner under the Act.

### **V.**

The Respondents are “persons” as defined by T.C.A. § 69-3-103(20) and as herein described, have violated the Act.

### **VI.**

Tennessee Code Annotated § 69-3-108 requires a person to obtain coverage under a permit from the department prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substance will move into waters of the state. Coverage under the general permit for Storm Water Discharges Associated with Construction

Activity (TNCGP) may be obtained by submittal of a Notice of Intent (NOI) a site specific Storm Water Pollution Prevention Plan (SWPPP) and appropriate fee.

## **VII.**

Pursuant to T.C.A. § 69-3-108, Rule 1200-4-7-.04 requires a person to submit an application prior to engaging in any activity that requires an Aquatic Resource Alteration Permit (ARAP) that is not governed by a general permit or a § 401 Water Quality Certification. No activity may be authorized unless any lost resource value associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource value.

## **VIII.**

Rock Creek and its unnamed tributaries, described herein, are “waters of the state” as defined by T.C.A. § 69-3-103(33). Pursuant to T.C.A. § 69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, *Use Classifications for Surface Waters*, is contained in the *Rules of Tennessee Department of Environment and Conservation Division of Water Pollution Control Amendments*. Accordingly, these waters of the state are classified for the following uses: fish and aquatic life, recreation, irrigation, livestock watering and wildlife.

## **FACTS**

## **IX.**

On September 13, 2007, division personnel from the Chattanooga Environmental Field Office (CHEFO) investigated a complaint from a resident of Spring Lake Subdivision. Division personnel noted that greater than one of acre of disturbance had occurred, no Erosion Prevention and Sediment Control (EPSC) measures had been installed, recently cut roads were not stabilized

and an impoundment had been constructed on a tributary to Rock Creek. Sediment from the construction of the access roads had migrated into the unnamed tributary and the impoundment as well as a wetland area adjacent to the impoundment. A file review indicated that coverage under the TNCGP and written ARAP authorization had not been requested or issued for these activities.

## **X.**

On September 17, 2007, the division issued a Notice of Violation (NOV) to Respondent Clark for the violations noted during the September 13, 2007, complaint investigation. The NOV instructed Respondent Clark to, within 7 days of receipt, install effective EPSC measures, stabilize all cut and fill slopes and provide contact information for the contractor conducting the construction activities. Additionally, Respondent Clark was instructed to submit, within 14 days of receipt, a NOI, SWPPP, appropriate fee and site map in order to obtain coverage under the TNCGP. Respondent Clark was also informed of the requirement to obtain written authorization under an appropriate ARAP prior to performing stream alterations. Respondent Clark acknowledged receipt of the NOV on September 22, 2007.

## **XI.**

On October 1, 2007, the division received contact information for both Respondents.

## **XII.**

On November 15, 2007, the division issued a NOV to both Respondents due to failure to respond to the NOV of September 17, 2007. The Respondents were instructed, within 14 days of receipt, to submit a NOI, SWPPP, appropriate fee and site map in order to obtain coverage under the TNCGP. Additionally, the Respondents were instructed, within 30 days of receipt, to submit

a detailed Corrective Action Plan (CAP) for the removal of the impoundment and restoration of the stream channel and associated springs and vegetation. Respondent Caldwell acknowledged receipt on November 17, 2007, and Respondent Clark acknowledged receipt on November 21, 2007.

### **XIII.**

On December 6, 2007, the division received correspondence from Respondent Clark which requested an appeal of the CAP requirement contained in the November 15, 2007, NOV. The NOI, SWPPP, appropriate fee and site map were not submitted to the division.

### **XIV.**

During the course of investigation, the division incurred DAMAGES in the amount of FOUR HUNDRED FORTY SIX DOLLARS AND FIFTY FOUR CENTS (\$446.54)

## **VIOLATIONS**

### **XV.**

By conducting land disturbance activities without coverage under the TNCGP and by altering waters of the state without authorization under an ARAP, the Respondents have violated T.C.A. §§ 69-3-108(a)–(b), 114(b), which state in part:

§ 69-3-108(a):

Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (j), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.

§ 69-3-108(b):

It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any Waters of the State;
- (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;
- (6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters;

§ 69-3-114(b):

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

## XVI.

By causing a condition of pollution in the wetland adjacent to the unnamed tributary to Rock Creek and the unnamed tributary to Rock Creek, the Respondents have violated T.C.A. Section 69-3-114(a).

T.C.A. § 69-3-114(a) states:

It shall be unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in §69-3-103(22), unless such discharge shall be due to an

unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

### **ORDER AND ASSESSMENT**

#### **XVII.**

WHEREFORE, pursuant to the authority vested by T.C.A. §§ 69-3-109, 69-3-115 and 69-3-116, I, Paul E. Davis, hereby issue the following ORDER AND ASSESSMENT to the Respondents.

1. The Respondents shall, within 7 days of receipt of this ORDER, establish effective EPSC measures on-site such that sediment is not allowed to leave the site or enter waters of the state.
2. The Respondents shall maintain EPSC measures until such time as all land disturbance activities at the site are complete and erosion-preventive permanent cover is established.
3. The Respondents shall, within 7 days of establishing effective EPSC measures, submit written documentation and photographic evidence indicating that these measures are in place. The Respondents shall submit this written documentation and photographic evidence to the Water Pollution Control Manager in the CHEFO at Suite 550 - State Office Building, 540 McCallie Avenue, Chattanooga, Tennessee 37402, and a copy to the Water Pollution Control Enforcement and Compliance (E&C) Section Manager, at 401 Church Street, 6<sup>th</sup> Floor L&C Annex, Nashville, Tennessee 37243-1534.
4. The Respondents shall, within 14 days of receipt of this ORDER, submit a NOI, appropriate fee, and SWPPP that conforms to the requirements of the TNCGP. The

SWPPP should be accompanied by a map that clearly shows the site boundaries and the entire planned area of disturbance. The SWPPP shall be prepared by professional engineer or landscape architect, licensed in the State of Tennessee and shall be submitted to the CHEFO at the address shown in item 3.

5. The Respondents shall, within 30 days of receipt of this ORDER, submit to the division a CAP to remove the impoundment on the tributary to Rock Creek and restore the affected segment of the tributary to its original condition and remove the accumulated sediment from the wetland. The CAP shall conform to the requirements of the NOV of November 15, 2007, and shall be prepared by a licensed professional engineer, landscape architect, or other competent professional and shall include a timetable for implementation of the proposed actions. The Respondents shall submit the CAP to the CHEFO for review and approval and a copy of the CAP to the E&C Section, at the respective addresses shown in item 3. The Respondents must correct any deficiencies the division finds upon review of the CAP and the corrected CAP should be resubmitted to the division within 30 days of notification of the deficiencies.
6. The Respondents shall, within 30 days of receipt of written approval of the CAP, initiate the approved actions. The written approval of the CAP by the division will constitute authorization for removal of the impoundment and stream restoration and no additional ARAP coverage is required. The Respondents shall submit written notification to the division that work has begun at the time the approved actions are initiated. The Respondents shall submit the written notification to the CHEFO and a copy to the E&C Section, at the respective addresses shown in item 3.



7. The Respondents shall, within 180 days of initiating the approved CAP, but not later than August 31, 2008, complete the CAP and submit written notification of completion to the division. The Respondents shall submit the written notification to the CHEFO and shall submit a copy of the written notification to the E&C Section, at the respective addresses shown in item 3.
8. The Respondents shall pay DAMAGES to the division in amount of FOUR HUNDRED FORTY SIX DOLLARS AND FIFTY FOUR CENTS (\$446.54), payable within 30 days of receipt of this ORDER AND ASSESSMENT.
9. The Respondents shall pay a CIVIL PENALTY of SEVENTEEN THOUSAND FIVE HUNDRED DOLLARS (\$17,500.00) to the division, hereby ASSESSED to be paid as follows:
  - a. The Respondents shall, within 30 days of entry of this ORDER, pay a CIVIL PENALTY in the amount of TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500.00).
  - b. If the Respondents fail to comply with Part XVII, item 1 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of TWO THOUSAND DOLLARS (\$2,000.00), payable within 30 days of default.
  - c. If the Respondents fail to comply with Part XVII, item 2 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of TWO THOUSAND DOLLARS (\$2,000.00), payable within 30 days of default.

- d. If the Respondents fail to comply with Part XVII, item 3 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of TWO THOUSAND DOLLARS (\$2,000.00), payable within 30 days of default.
- e. If the Respondents fail to comply with Part XVII, item 4 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500.00), payable within 30 days of default.
- f. If the Respondents fail to comply with Part XVII, item 5 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500.00), payable within 30 days of default.
- g. If the Respondents fail to comply with Part XVII, item 6 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of TWO THOUSAND DOLLARS (\$2,000.00), payable within 30 days of default.
- h. If the Respondents fail to comply with Part XVII, item 7 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of TWO THOUSAND DOLLARS (\$2,000.00), payable within 30 days of default.

The Respondents shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

The director may, for good cause shown, extend the compliance dates contained within this ORDER. In order to be eligible for this time extension, the Respondents shall submit a written request to be received in advance of the compliance date. The written request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. Any such extension by the division will be in writing. Should the

Respondents fail to meet the requirement by the extended date, any associated Civil Penalty shall become due 30 days thereafter.

Further, the Respondents are advised that the foregoing ORDER is in no way to be construed as a waiver, expressed or implied, of any provision of the law or regulations. However, compliance with the ORDER will be one factor considered in any decision whether to take enforcement action against the Respondents in the future.

Issued by the director of the Division of Water Pollution Control on behalf of the Commissioner of the Tennessee Department of Environment and Conservation on this 18<sup>th</sup> day of December 2007.



Paul E. Davis, P.E.  
Director, Division of Water Pollution Control

#### **NOTICE OF RIGHTS**

Tennessee Code Annotated §§ 69-3-109, 115, allow any Respondent named herein to secure review of this Order and Assessment. In order to secure review of this Order and Assessment, the Respondent must file with the Department's Office of General Counsel a written petition setting forth each of the Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondent must file the written petition within thirty (30) days of receiving this Order and Assessment. The petition should be sent to: "Appeal of Enforcement Order, TDEC-OGC, 20th Floor L & C Tower, 401 Church Street, Nashville, TN 37243-1548".

If the required written petition is not filed within thirty (30) days of receipt of this ORDER AND ASSESSMENT, the ORDER AND ASSESSMENT shall become final and will

be considered as an agreement to entry of a judgment by consent. Consequently, the ORDER AND ASSESSMENT will not be subject to review pursuant to T.C.A. §§ 69-3-109 and 69-3-115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. § 4-5-301 *et seq.* (the Uniform Administrative Procedures Act.) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses on its behalf to testify.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization.

Payment of the civil penalty shall be made to "Treasurer, State of Tennessee" and shall be sent to the Division of Fiscal Services, Consolidated Fees Section, Tennessee Department of Environment and Conservation, 14<sup>th</sup> Floor L & C Annex, 401 Church Street, Nashville, TN 37243. The case number, shown on the first page of this Order and Assessment, should be included on or with the payment. All other correspondence shall be sent to Paul E. Davis, Director, Division of Water Pollution Control, Tennessee Department of Environment and Conservation, 6<sup>th</sup> Floor L & C Annex, 401 Church Street, Nashville, TN 37243.